IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 59 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BTX CHEMICAL PVT LTD - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MR RK PATEL for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,
M/S.VYAS ASSOCIATES for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 28/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. This Income-tax Reference is arising out of the order of Income-tax Appellate Tribunal dated 20.9.1990 in R.A.No.413/Ahd/1989 and R.A.No.443/Ahd/1989, both for assessment year 1980-81. R.A. No.413/Ahd/1989 is filed by the assessee and at the instance of the assessee, the tribunal has referred to the following question of law for the opinion of this Court :-

(a) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming the levy of penalty under Section 271(1)(c) of the I.T.Act, 1961 to the extent of

the claim relatable to an amount of Rs.1,83,492/- ?

2. R.A. No.443/Ahd/1989 is filed by the Revenue and at the instance of the Revenue, following question of law is referred to for the opinion of this Court.

(a) Whether, the appellate Tribunal is right in law and on facts in cancelling the penalty referable to income of Rs.1,00,112/-?

The brief facts giving rise to the present reference are as under :-

3. The assessee is a private limited company carrying on the business of manufacturing and selling chemicals, Sodium Benzoate and Benzoate and Benzoic Acid at Baroda. The assessment year involved is 1980-81 for which the accounting period ended on 30.6.1979. Before few days from the close of its accounting period on 30.6.1979 a fire broke

out in assessee's factory resulting in destruction of and/or substantial damage to its building, plant and machinery and finished or semi-finished goods, all insured. The assessee claimed (i) a sum of Rs.1,83,492/- from the Insurance Company on account of loss and damage to its plant and machinery on replacement cost basis and (ii) a sum of Rs.1,00,112/- on account of loss to its finished or semi-finished goods. The Insurance Company, however, paid, in the month of November/December, 1979, a sum of Rs.84,462/- in respect of the former claim and and a sum of Rs.56,173/- in respect of the latter.

4. The assessee filed its return of income for the year under consideration on 30.6.1980 declaring a loss of Rs.75,605/-. In its said return the assessee had claimed loss of Rs.1,83,492/- in respect of destruction of and/or damage to its plant and machineries.

The Income-tax Officer, however, noted that the written down value of the building plant and machinery and the electric installations lost in fire was only Rs.74,349/- against which the assessee had received Rs.84,462/- from the Insurance Company. He, therefore, instead of allowing balancing depreciation, worked out profit under Section 41(2) of the Act at Rs.10,112/- (Rs.84,462 – Rs.74,350) and added the same to the income of the assessee. Consequently, loss claimed by the assessee on account of destruction of damage to plant and machinery was disallowed. In appeal, the learned CIT(A) upheld disallowance of Rs.1,83,492/- as being loss of capital nature. But with regard to addition of Rs.10,112/- on account of terminal allowance or profit under Section 41(2) of the Act, the learned CIT(A) directed the I.T.O to consider for taxation the amount of Rs.84,462/- received from Insurance Company for loss of capital asset, in the

immediately succeeding year.

5. The assessee had further claimed an amount of Rs.1,00,112/- on account of loss of stock due to fire. The I.T.O noted that on physical verification of the stock, made after the incident, the assessee had valued its stock at Rs.2,46,545/- and had submitted the same valuation, as on 30.6.1979, to the bank also. The I.T.O., however, further noted that the assessee had claimed double deduction of this amount of Rs.1,00,112/-. In the first place, the said amount was debited to consumption of raw material account and in the second the same amount was also debited to the “P & L A/c.” under the head of “goods lost in fire”. The I.T.O., therefore, added the amount of Rs.1,00,112/- to the income of the assessee. In appeal, the learned CIT(A) confirmed the addition with the remarks that the appellant had tried to make its claim in this behalf twice.

6. During the course of assessment proceedings the I.T.O initiated penalty proceedings under Section 27(1)(c) of the Act for assessee's furnishing inaccurate particulars of its income and thus concealing its income in respect of the two amounts of Rs.1,83,492/- and Rs.1,00,112/-, as stated above. The assessee contested the notice with the contention that the difference in income as returned by it and as finally assessed arose from the wrong interpretation of the effect of loss of assets in fire, given in assessee's books of accounts, and resulted from circumstances beyond the control of the assessee. It denied the presence of any fraud or any gross or willful neglect on its part in furnishing the particulars of its income in the return and further contended that it entertained a bonafide belief that the loss in fire, caused to its assets and stock, would be admissible

in law. In support of such explanation the assessee had mainly relied upon the Supreme Court decision in the case of Anwar Ali (76 ITR 696). The I.T.O did not feel satisfied with this explanation and rejecting the same, he held that the assessee had unsuccessfully attempted to conceal the particulars of its true income and had furnished inaccurate particulars thereof. In his opinion, the decision of the Supreme Court in the case of Anwar Ali (Supra) did not help the assessee, instead the decision of the Punjab and Haryana High Court in the case of Vishwakarma Industries Vs. C.I.T. (135 ITR 652) clearly justified the levy of penalty in the facts and circumstances of the instant case. He, therefore, levied penalty of Rs.1,50,000/- under Section 271(1)(c) of the Act.

7. In appeal, the learned CIT(A) confirmed the penalty levied by the I.T.O by holding that in the instant case, the assessee had falsely

claimed deduction of capital loss in the Profit & Loss A/c and had also further fraudulently suppressed its closing stock by claiming double deduction in the trading account. In the opinion of the learned CIT(A), the assessee had attempted to reduce its taxable income and both the steps of the assessee, as mentioned above, amounted to concealment of particulars of income as well as furnishing of inaccurate particulars of its income with an intention to evade tax. While confirming the penalty the learned CIT(A) followed the decision of the Kerala High Court in the case of CIT Vs. India Sea Foods (1976) 105 ITR 708.

8. Being aggrieved by the said order of the learned CIT(A) the assessee preferred second appeal before the Tribunal and contended that the assessee-company had acted in good faith and in all bonafide in estimating its loss at Rs.1,83,492/- in

respect of Plant and Machinery and at Rs.1,00,112/- for loss to its goods. It was emphasized that it was due to assessee's Chartered Accountant that loss to the goods was doubly shown in the books of the assessee. It was urged that the double claim could not have been suppressed by the assessee-company as the same was to affect the opening stock of the succeeding year and the mistake could have very well been detected. It was also pointed out that there had been no deliberate attempt on the part of the assessee to conceal its income. On behalf of the Revenue, it was highlighted that knowing very well that the fire had destroyed the capital assets of the assessee-company and it had lodged its claim with the Insurance Company for reimbursement of Plant and Machinery damaged by the fire on “replacement cost basis”,the assessee-company had not only chosen to claim deduction of Rs.1,83,492/- but had also insisted upon such

a claim at the assessment and appellate stages of the proceedings knowing or having reasons to believe its claim to be untrue. In respect of the penalty referable to Rs.1,00,112/- i.e the amount of loss sustained by the assessee-company to its stock by fire, it was submitted on behalf of the Revenue that the claim for double deduction was deliberate and had not resulted from any clerical mistake or oversight on the part of the Chartered Accountant of the assessee-company.

9. The Tribunal, after considering the argument of the respective parties, came to the conclusion that the provisions of Explanation to Sec.271(1)(c) were not applicable to the instant case as they have not been applied by the Income-tax authorities. The Tribunal, therefore, proceeded on the footing that the burden to prove that the conduct of the assessee

company was contumacious or dishonest and it had acted on defiance of law in the discharge of its obligation and had accordingly, concealed its income or had furnished inaccurate particulars of its income was on Revenue. With regard to penalty referable to the amount of Rs.1,83,492/- which had been claimed by the assessee-company as loss caused by fire to its plant and machinery, the Tribunal pointed out that the plant and machinery were capital assets of the assessee-company and it was getting depreciation upon them. The Tribunal further pointed out that the Insurance company had been moved by the assessee-company for replacement of the damaged plant and machinery on cost basis. The Tribunal, therefore, finally held that penalty referable to the aforesaid amount regarding capital loss but dishonestly claimed as trading loss in Profit & Loss A/c was well justified. This part of the Tribunal's

findings has given rise to the assessee's prayer for reference on a question proposed by it.

10. With regard to penalty referable to Rs.1,00,112/- claimed as loss to the stock, the Tribunal held that the double claim for that amount had been made due to some bonafide mistake on the part of the assessee-company. The Tribunal observed that the said loss was to affect the opening stock in the next year and, therefore, could have been found out and would have not resulted in any advantage to the assessee. For these reasons, the Tribunal cancelled the penalty proportionately referable to the amount of Rs.1,00,112/-. This part of the Tribunal's order has given rise to the prayer for reference on the question proposed by the revenue.

11. Mr.R.K.Patel, learned advocate appearing

for the assessee has submitted that the assessee has been in the business of chemical manufacture since 1969-70 and during the last about 10 years its record of performance has been absolutely clean and no major disallowances were ever made in past. He has further submitted that at the time of filing its return on 30.6.1980, the assessee had not been able to relieve itself of the shock of its life which had come in the form of a disastrous fire, burning assessee's capital assets and finished or semi-finished goods. It is further submitted that the fire had broken out on 17.6.1979 and soon thereafter the assessee had lodged its claim for reimbursement by the Insurance Company at Rs.1,83,492/- in respect of loss of plant and machineries and at Rs.1,00,112/- for loss of its goods. Under the given circumstances, the assessee had acted in good faith and in all bonafides in estimating its loss at those figures and could have, therefore,

legitimately claimed these amounts as deductions. He has further submitted that the Chartered Accountant has audited and certified the loss in fire to the extent of Rs.1,83,492/- for the loss of plant and machineries, building, electrical installation etc, and a sum of Rs.1,00,112/- on account of loss of stock of finished goods in fire during the year ending 30.6.1979. He has further submitted that under the advice of Chartered Accountant the said loss has been adjusted in the books of account by giving necessary effects and the same to Profit and Loss Account and Balance Sheet. He has further submitted that there was nothing malafide in all that on the part of the assessee. He has further submitted that even in quantum appeal, the learned CIT(A) had deleted the addition, as made by the Income-tax Officer on account of terminal allowance or profit under Section 41(2) and had further directed the I.T.O to consider

the amount of Rs.90,259/- as the written down value of the destroyed capital assets and not to charge any tax on Rs.84,362/-, the amount received by the assessee from the Insurance Company.

12. Mr.Patel has further submitted that at the time when the return was filed claiming the revenue loss, the legal position was not clear. This Court in the case of **CIT vs. Vania Silk Mills P.Ltd., 107 ITR 300** has taken the view that the money received towards insurance claim on account of the damage or destruction of the capital assets is so received on account of the transfer within the meaning of Section 45 read with 2(47) of the Act and therefore chargeable to capital gains tax under the said Section. This decision has been challenged by that assessee before the Hon'ble Supreme Court and while reversing the judgment of this Court in the case of **Vania Silk Mills P.Ltd vs. CIT,**

191 ITR 647 (Supreme Court), the Hon'ble Supreme Court has observed that capital gains tax was attracted under Section 45 by transfer and not merely by extinguishment of rights howsoever brought about. Whatever the mode by which the transfer was brought about, the existence of the asset during the process of transfer was a precondition : unless the asset existed in fact, there could not be a transfer of it. The extinguishment of a right or rights should in any case be on account of its or their transfer in order to attract the provisions of Section-45. If it was not, and was on account of the destruction or loss of the asset, it was not a transfer and did not attract the provisions of Section 45 which related to transfer and not to mere extinguishment of a right. Hence, an extinghisuhment of right not brought by transfer was outside the purview of Section-45. The Court further held that in the case of damage, partial or complete,

or destruction or loss of the property, there was no transfer of it in favour of a third party. The money received under the insurance policy in such cases was by way of indemnity or compensation for the damage, loss or destruction of the property. It was not in consideration of the transfer of the property or the transfer of any right in it in favour of the insurance company. It was by virtue of the contract of insurance or of indemnity, and in terms of the conditions of the contract. The Court further held that while paying for the total loss of or damage to the property, the insurance company took over such property or whatever was left of it, did not change the nature of the insurance claim which was indemnity or compensation for the loss. The payment by the insurance company was not in consideration of the property taken over by the insurance company. The Court therefore held that the amount received from the

insurance company was not capital gains and was not chargeable to tax under Section-45.

13. Mr.Patel has further submitted that the decision of Vania Silk Mills P.Ltd vs. CIT (Supra) has come up for consideration before the Hon'ble Supreme Court in the case of **CIT vs. Mrs.Grace Colli's and others, 248 ITR 323, wherein it is held that the definition of "transfer" in Section 2(47) clearly contemplates the extinguishment of rights in a capital asset distinct from and independent of such extinguishment consequent upon the transfer thereof.** It is not correct to view the expression " extinguishment of any rights therein" as not extending to mean the extinguishment of rights independent of or otherwise than on account of transfer. To read so is to render the expression ineffective and its use meaningless. The expression includes the extinguishment of rights in a capital asset independent of and

otherwise than on account of transfer. The Court therefore disapproved the observation made by the earlier Bench of Hon'ble Supreme Court in the case of Vania Silk Mills P.Ltd vs. CIT (Supra).

14. Mr.Patel has, however, drawn the attention of the Court to the decision of the Madras High Court in the case of **Neelamalai Agro Industries Ltd., vs. CIT, 259 IT 651**, wherein it is held that in the case of Mrs.Grace Colli's (2001) 248 ITR 323(SC), the Court did not have occasion to go into the question as to whether the destruction of a capital asset which as a consequence brings about the extinguishment of the rights of the assessee-owner in such asset, would amount to transfer. The Court did not hold that Vania Silk Mills P.Ltd's case 191) ITR 647 (SC) was wrongly decided, or that the definition of “transfer” in Section 2(47), particularly, the use of the words “extinguishment of any

rights therein" would cover cases of destruction of the capital asset. Cases such as the destruction of the capital asset in a fire, or its complete loss as in the case of sinking of a vessel in the sea, cannot be regarded as having been brought within the fold of definition of "transfer" in Section 2(47) by reason of what has been said and laid down in the case of Mrs.Grace Colli's (2001) 248 ITR 323(SC). The Court therefore held that the law laid down in Vania Silk Mills P.Ltd's case (1991) 191 ITR 647 (SC), that extinguishment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the Apex Court in the case of Mrs.Grace Colli's (2001)248 ITR 323.

15. Based on the aforesaid legal position Mr.Patel has strongly urged that there is no justification in arriving at the conclusion

that “knowing very well that the fire had destroyed the capital assets of the assessee-company and it had lodged its claim with the Insurance Company for reimbursement of Plant and Machinery damaged by the fire on “replacement cost basis”, the assessee-company had not only chosen to claim deduction of Rs.1,83,492/- but had also insisted upon such a claim at the assessment and appellate stage of the proceedings knowing or having reasons to believe the same to be untrue.”

16. Mr.Patel has further relied on the decision of this Court in the case of **National Textiles vs. CIT, 249 ITR 125**, wherein it is held that in order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the

purpose of penalty that the amount has been assessed as income, and (ii) the circumstances must show that there was animus, i.e conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. The Court further held that where the circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the assessee must be held to have proved that there was no means rea or guilty mind on his part. Even in this view of the matter the explanation alone cannot justify levy of penalty. Absence of proof acceptable to the Department can not be equated with fraud or willful default.

17. Mr.Patel has further relied on the decision of this Court in the case of **Sarabhai Chemicals Pvt. Ltd., vs. CIT, 257 ITR 355**, wherein it is held that deeming fiction contained in Explanation 1 to Section

271(1)(c) of the Income-tax Act, 1961, that the added/disallowed amounts represent the income in respect of which particulars have been concealed will not apply if the explanation that was given by the assessee in the quantum proceedings which he could not substantiate in those proceedings was (i) bona fide and(ii) if he had disclosed all the facts relating to the same and material to the computation of his total income.

18. Mr.Patel further invited the Court attention to para-61.8 of Circular No.204, dated July 24, 1976 being the Explanatory notes on the provision of the Taxation Laws (Amendment) Act, 1975 effective from 1.4.1976 and 1.4.1977. This circular is reported in 110 ITR (Statute) page-21. It says that new explanation 1 provides that where in respect of any facts material to the computation of his total income, an assessee fails to offer an explanation or is unable to substantiate

an explanation offered by him or offers an explanation which is found to be false, the amount added or disallowed in computing the total income of such person as a result thereof will be treated as his concealed income. If, however, the explanation offered by the assessee is bona fide and all the facts relating to the explanation and material to the computation of total income have been disclosed by the assessee, Explanation 1 will not be applicable. Precisely for this reason, the Income-tax Officer has not applied Explanation-1 to the facts of the assessee's case.

19. With regard to the levy of penalty relatable to the sum of Rs.1,00,112/- for which the revenue is in reference, Mr.Patel has submitted hat it was a bona fide mistake of assessee's Chartered Accountant that the said amount was doubly claimed by the assessee. He has further submitted that the

penalty should not be levied for bona fide mistake and for those mistakes which were quite apparent from the record and could have never been suppressed by the assessee, even if it had so desire. The double claim was to affect the opening stock in the succeeding year and mistake could have very well been known. In this connection Mr.Patel has relied on the decision of this Court in the assessee's own case, namely, **B.T.X. Chemicals (P) Ltd., and others vs. Suraj Bhan and another, 177 ITR 425**, wherein it is held that an assessee can be prosecuted only if it is shown that he had a malafide intention or mens rea for committing the particular crime. A bona fide mistake made by the assessee while filing in his income-tax return would not necessarily amount to an intention to commit a crime punishable under Section 276C of the Income-tax Act, 1961. This Court has held that the return that was filed on June 30, 1980, pertained to the accounting period

which ended on June 30, 1979. It would, therefore, reflect the picture of the company's finance and the company's affairs between the period July 1, 1978, and June 30, 1979. A thing which transpired in December, 1979, namely, reimbursement by the insurance company would not be reflected in such a return because it was an event which had taken place subsequently. Moreover, this would have been discovered. The Income-tax Officer with his powers of reassessment would have found out about the reimbursement of loss. Ultimately, it would not have resulted in any advantage to the assessee. The Court therefore held that the prosecution was not valid and was liable to be quashed. Mr.Patel has submitted that this observations are quite important for the purpose of cancellation of penalty levied under Section 271(1)(c) of the Act.

20. Mr.Patel has further relied on the

decision of this Court in the case of **CIT vs. Milex Cable Industries, 261 ITR 675**, wherein this Court has taken a view that the question whether a person had a guilty mind is a question of fact. In that case, mistakes were committed in totaling and the moment the assessee came to know about the mistakes committed in the books of account, while preparing the accounts for the subsequent year, the assessee informed the Income-tax Officer about it. The Tribunal had come to a final conclusion that there was no case for imposing penalty and the mental state of the assessee being a question of fact, it would not be proper for the court to take a different view. The Court therefore has taken a view that the Tribunal was justified in deleting the penalty. Here in the present case the Tribunal has held that double claim for this amount was due to the result of bona fide mistake on the part of the assessee. Mr.Patel has, therefore, submitted that this

being a finding of fact given by the Tribunal the same should not be interfered with by this Court.

21. Mr.Patel has further relied on the decision of the Hon'ble Supreme Court in the case of **K.C. Builders and another vs. Assistant Commissioner of Income-tax, 265 ITR 562**, wherein it is held that “concealment” inherently carries with it the element of mens rea. The fact that some figure or some particulars have been disclosed, even if it takes out the case from non-disclosure, would not by itself take the case out of the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt amounts neither to concealment nor to deliberate furnishing of inaccurate particulars of income, unless and until there is some evidence to show or circumstances are found from which it can be gathered that the omission was attributable to an intention or

desire on the part of the assessee to hide or conceal the income so as to avoid imposition of tax thereon. Mr.Patel has further submitted that what is applicable to quashing of prosecution is equally applicable to quashing of penalty levied under Section 271(1)(c) of the Act.

22. In view of the aforesaid factual background and the law laid down by this Court as well as by the Hon'ble Supreme Court, Mr.Patel has strongly urged that the penalty levied and/or confirmed by the Tribunal is not at all justified and hence the same should be deleted in its entirety.

23. Mr.D.D.Vyas, learned Senior Standing Counsel appearing on behalf of the Revenue, on the other hand supported the view taken by the Tribunal. So far as it relates to confirmation of levy of penalty referable to the disallowance of loss of Rs.1,83,492/- is

concerned, Mr.Vyas has submitted that the penalty proceedings under the Are are in the nature of quasi criminal proceedings and that should not be equated with criminal proceeding for the purpose of standard of proof and discharging burden of such proof. He has further submitted that in the criminal proceeding the prosecution has to prove the guilt of the accused beyond the reasonable doubt whereas in quasi criminal proceedings are to be decided on the basis of pre-ponderance of probability as this proceedings are of civil nature. He has further submitted that the burden on the department in penalty proceedings was not such as can never be discharged, provided the department is not required to prove the impossible. He has further submitted that the assessee very well knew that the fire had destroyed its capital assets for which the assessee had lodged its claim with the Insurance Company for their reimbursement on “replacement cost

basis". The assessee has not only chosen to claim deduction of Rs.1,83,492/- in that behalf at the assessment proceedings on Revenue head but insisted upon such a claim at appellate stage for knowing or having reasons to believe the same to be untrue. He has further submitted that after repeated demands the assessee had furnished the written down value of the destroyed assets at Rs.74,350/- before the I.T.O but at the appellate stage and after much efforts of the CIT(A) the assessee raised written down value to Rs.90,255/-. He has further submitted that there was no justification in assessee's claiming a capital loss as a revenue loss, not declaring the written down value of the destroyed asset and declaring the same after much efforts by the ITO/CIT(A) and that too at different figures. He has, therefore, submitted that the very conduct of the assessee belies its assertion of its having committed a bonafide mistake or having acted

in good faith.

24. Mr.Vyas further submitted that there was concurrent findings of all the three authorities, so far as the levy of penalty in relation to disallowance of loss is concerned. He has further submitted that the explanation tendered by the assessee is also not bonafide nor it can be said to be reasonable. The assessee has deliberately concealed the particulars and made false claim in its return of income-tax and also tried to justify the said claim during the course of assessment and appeal proceedings. He has, therefore, submitted that the findings of fact arrived at by the lower authority cannot be disturbed by this Court while deciding this issue in the present reference.

25. So far as deletion of penalty referable to the deduction of Rs.1,00,112/- on account

of loss to its stock by fire and its plea that the claim of double deduction in that behalf was simply a bonafide mistake resulting from the Clerical mistake or due to oversight of the Chartered Accountant is concerned, Mr.Vyas submitted that the assessee's own conduct would have spoken of its bonafide or good faith had the assessee rectified or even agreed to rectify the said mistake as and when the same was pointed out to it by the ITO. But the insistence of the assessee in reagitating the said claim in appeal to the CIT(A) despite knowing or having reasons to believe the same to be false and untrue insisting upon its acceptance as true by the authorities concerned, the assessee had certainly exhibited the conduct contumacious and dishonest. Mr.Vyas, therefore, submitted that the penalty was wrongly deleted by the Tribunal in relation to disallowance of loss of Rs.1,00,112/-. He has, therefore,

submitted that the questions referred to by the Tribunal at the instance of the assessee and the revenue should be answered in favour of the revenue and against the assessee.

26. We have considered the arguments canvassed by the learned advocate Mr.R.K.Patel appearing for the assessee and the learned Standing Counseal Mr.D.D.Vyas appearing for the Revenue. We have gone through the orders passed by the authorities below. Authorities cited before the Courts by both the sides and referred to in the orders under challenge are considered and examined in the light of facts found on record of this case. We found, ourselves in agreement with the Tribunal's finding so far as it relates to the quashing of penalty relatable to disallowance of loss of Rs.1,00,112/-. We, however, express our inability to agree with the finding arrived at and conclusion drawn by the Tribunal while

confirming the penalty relatable to the disallowance of loss of Rs.1,83,492/-.

27. As far as question of law referred to us by the Tribunal at the instance of the assessee is concerned, we are of the opinion that by virtue of four decisions, namely, (i) CIT vs. Vania Silk Mills (P) Ltd., 107 ITR 300, (ii) Vania Silk Mills (P) Ltd., vs. CIT 191 ITR 647 (SC) (iii) CIT vs. Mrs. Grace Collis and others, 248 ITR 323 (SC) and (iv) Neelamalai Agro Industries Ltd., vs. CIT 259 ITR 651 (Mad), it can not be said that the assessee was knowing or was having reasons to believe that its claim of Rs.1,83,492/- treating the same as revenue loss, is untrue. The assessee has filed its return of income on 30.6.1980 claiming deduction of Rs.1,83,492/- on the basis of its claim lodged with the Insurance Company on account of loss and damage to its plant and machinery on replacement cost basis. The decision of

this Court in Vania Silk Mills (P) Ltd., (Supra) was assailed before the Supreme Court and it was reversed on 14.8.1991. It holds the field till 23.2.2001, when certain observations made therein were disapproved by the larger Bench of the Hon'ble Supreme Court in CIT vs. Mrs.Grace Collis (Supra). It is, however, worthwhile to derive support from the observations made by the Division Bench of Madras High Court in Neelamalai Agro Industries Ltd., (Supra) for the purpose of deciding the issue as to whether the assessee was knowing that it has made any false claim in its return of income. The Court held that the law laid down in Vania Silk Mills (P) Ltd's case (1991) 191 ITR 647 (SC) that extinghisuhment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the Apex Court in the case of Mrs. Grace Colli's (2001) 248 ITR 323. This discussion undoubtedly reveals

that if the assessee has bonafide believed on the basis of advice received from its Chartered Accountant that the loss occurred as a result of destruction of assets such as plant and machinery, buildings, electrical installations etc, was of revenue nature and claimed it by way of deduction, it would not be a case of 'concealment' within the ambit and scope of Section 271(1)(c) of the Act.

28. We have also found substance in the other arguments of Mr.Patel on this issue. All facts were disclosed before the authorities. Explanation was offered which has not been found favour with he authorities. But, simply on that ground penalty under Section 271(1)(c) cannot be levied. The ITO has rightly not invoked the provisions of Explanation-1 to Section 271(1)(c). The burden was not, therefor4e, on the assessee to discharge. The decision of this Court in Sarabhai Chemical's Case (Supra) and

Explanatory note on Explanation-1 to Section 271(1)(c) would certainly help the assessee's case inasmuch as the explanation offered by the assessee is bonafide and all the facts relating to the explanation of total income have been disclosed by the assessee. We are, therefore, of the view that there is no case of levy of penalty under Section 271(1)(c) of the Act, in relation to the disallowance of loss of Rs.1,83,492/- claimed by the assessee and it is accordingly deleted.

29. As far as question of law referred to us by the Tribunal at the instance of revenue is concerned, we are of the view that the Tribunal has rightly decided this issue. The Tribunal as a matter of fact, found that the double claim for an amount of Rs.1,00,112/- was made due to some bonafide mistake on the part of the assessee. No sooner an entry was made in the trading account of this year, it was to affect the opening stock in the next

year, and hence it could have been easily found out and would not have resulted in any advantage to the assessee. We, therefore, confirm the order of the Tribunal on this issue and hold that the penalty relatable to the disallowance of loss of Rs.1,00,112/- is rightly deleted by the Tribunal.

30. In the result, both the questions referred to us at the instance of assessee as well as revenue are answered in favour of the assessee and against the revenue. This reference is answered accordingly without any order as to costs.

(A. R. DAVE, J.) (K.A. PUJ, J.)

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